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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 763

UNION BARGE LINE CORPORATION,
DRAVO CORPORATION and
AETNA CASUALTY AND SURETY COMPANY,
Petitioners,

versus

WALTER M. ALLEN,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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May It Please the Court:

It is submitted that respondent's brief in opposition to the petition for a writ of certiorari has attempted to categorize this case as being within the ambit of a factual decision rather than meeting the legal issues which were presented in the petition and which we submit are inherent in the record.

The entire thrust of the opposition is that respondent's injuries were sustained when the M/V MARINER was in navigation and that the repairs being performed were "routine maintenance" so as to require the application of

the *Sieracki* doctrine. Petitioners do not take the position that the MARINER was removed from navigation in the sense of *West vs. United States*, 361 U.S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161 (1959). However, the record clearly indicates that the repairs which were being performed were not "routine" in the sense of day-to-day or month-to-month repairs. They were "routine" in the sense of there being required on a more or less regular schedule. Whether or not the repairs were "routine," it can hardly be said that a vessel with gaping holes in her underwater structure resulting from her shafts having been pulled, is not withdrawn from navigation during the period that the shafts are withdrawn. It can hardly be said that a vessel is "in navigation" for purposes of a warranty of seaworthiness, simply because repairs are performed on a regularly scheduled basis — annually or biannually. No inference that the vessel is not withdrawn from navigation may be drawn from this fact, for in her then status, she is as unseaworthy and unfloatable as a ship with no bottom. To compare this type of work with the work of removing accumulated sludge or washing down the engine room (Opposition, Page 9) is rather far-fetched to say the least.

Likewise, to attempt to isolate the work which was being performed by the injured shore-based worker and break down the overall repair job on the shafts and propellers into its component parts cannot be justified. The work which respondent was performing at the time that he sustained his injury was so closely connected to the removal and reinstallation of the propeller shafts as to be an integral part thereof.

We pass without more than this comment the argument that the work was done in a floating dry dock and that the machine shop was a floating machine shop. (Opposition, Page 6) Whether the shops were floating or were

situated on land, and whether the vessel was in a graving dock, a dry dock, on a marine railway, or any other type of repair basin is of no moment: the ultimate fact is that the MARINER was removed from the water and was inoperable.

Despite respondent's attempt to suggest to this Court that the petition involves only factual issues, respondent recognizes in his opposition that there is a clear cut legal issue involved. On page 8 of the opposition, respondent says:

> "However, it is submitted that under the decisions of this Honorable Court, once the status of the vessel is determined as being that of a ship in navigation, a detailed inquiry into the precise task being performed by each of the shorebased workers is precluded. The decisions make it clear that once this status is determined, all engaged in the repair operation are entitled to the warranty if the status be that of a ship in navigation, and none are entitled to the warranty if the determination of status is otherwise.
>
> The warranty of seaworthiness arises from the vessel's status as such, and extends to all engaged in her service. *Seas Shipping Co. v. Sieracki*, 328 U.S. 878, 66 S. Ct. 872."

Other than *Sieracki*, which does not stand for the proposition that respondent claims, no authorities of this Court or of any lower Courts are cited. Petitioner concedes that the MARINER was not withdrawn from navigation in the *West* sense. The record, however, as above mentioned, is clear that the MARINER was out of the water and inoperable. Under these circumstances, it is our submission that a shore-based repairman using specialized heavy equipment and tools not available on a vessel is not entitled to a warranty of seaworthiness.

It is not correct to say, as respondent does, that once a vessel is determined to be "in navigation" all shore-based workers of whatever type and regardless of the type of work being performed are entitled to a warranty. Neither *Sieracki*, *West*, nor any other decision of this Court so holds, and on the contrary the statement flies in the face of *Halecki*, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959). As in *Halecki*, the respondent here "was not doing what any crewmember had ever done on this ship or anywhere else in the world", for it would be impossible for the members of the crew to pull the shafts of a vessel unless and until the vessel was out of the water and shore-based cranes are used.

A District Court in Massachusetts in an opinion published after the filing of the petition herein has so recognized. *Madden vs. United States*, 259 F. Supp. 663 (D.C. Mass., 1966) involved facts virtually identical to those in the instant case, but reached a directly contrary conclusion. We realize that a conflict between the Circuits rather than between District Courts is a requisite for invoking Rule 19 of the Rules of this Court insofar as applications for writs of certiorari are concerned, but we submit that the decision in the cited case demonstrates that there is an area of confusion existing which requires that this Court review this case if only to set forth guide lines for the Lower Courts to act on in the future.

In *Madden*, a United States Navy icebreaker was in the Bethlehem Steel Corporation shipyard in Boston for repairs. The vessel's twin propellers were being removed while she was in dry dock. Half of the crew had left on

furlough. In the process of reinstalling one of the propellers, a Bethlehem shipyard employee fell from a temporary staging and was injured. The District Court held that there was no warranty of seaworthiness, saying:

> "A 16,000 ton vessel which has had her twin 25-ton screws removed, which has shut down her engine and is receiving electrical and steam power from a source on shore, which has put half or more of her crew on furlough, and which is in drydock, is not a vessel in operating condition. Hence, her owner makes no warranty of seaworthiness while she is in that condition."

Cases involving injuries to shipyard employees sustained on board vessels are numerous. In no case that we have found, however, other than the instant case, has any Court gone so far as to hold that the owner of a vessel in dry dock, with her shafts removed and undergoing repairs which could not and never have been performed by crewmembers because in part of the need for shore-based gear, owes a warranty of seaworthiness to a shore-based worker injured in the performance of such work. Historically and conceptually, the work is not that of a seaman and no reason exists for the further extension of the doctrine of *Sieracki;* and certainly if the doctrine is to be extended, the ultimate word should be handed down by this Court and not by inferior Courts, which as shown herein will surely lack the uniformity so desired by the Admiralty and our social conditions. A worker on the east bank of the Hudson River should have no different rights under United States law than one on the east bank of the Mississippi River. Unless Your Honors grant our application and set the issue at rest, the lower Courts in applying the doctrine

will only create more confusion than already exists in this dynamic and already confused area.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing supplemental brief on behalf of petitioner has been duly served on C. Paul Barker, Esq. and John L. Avant, Esq. by depositing same in the United States mail, postage prepaid, addressed to them at their office at 429 Government Street, Baton Rouge, Louisiana 70821.

New Orleans, Louisiana, this ..... day of January, 1967.